# In the Supreme Court of the United States

OCTOBER TERM, 1974

---

No. 73-1985

PATRICK NEWELL, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

---

**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

---

Petitioner claims that the district court violated Rule 11, Fed. R. Crim P., by failing to advise him of his eligibility to be sentenced pursuant to the Federal Youth Corrections Act, 18 U.S.C. 5005 *et seq.*, before accepting his guilty plea, and that the judge erroneously failed to order petitioner's presence when he corrected the sentence.

In 1971 an indictment was filed in the United States District Court of the Northern District of Illinois charging petitioner in four counts with sale and possession of depressant or stimulant drugs in violation of 21 U.S.C. (Supp. IV, 1964 ed.) 331(q)(3)(A). At his arraignment on October 26, 1971, peitioner withdrew his not guilty plea to one of the possession counts (Count Two), and entered a plea of guilty. Before accepting the plea, however, the district judge conducted an inquiry into

its voluntariness, as required by Rule 11, Fed. R. Crim. P. The court explained, *inter alia*, that the count could draw a maximum sentence of five years' imprisonment and a $10,000 fine. Following this colloquy, the court accepted the plea and the remaining counts were dismissed on motion of the government. On December 7, 1971, petitioner was sentenced to five years' imprisonment. Execution of sentence was suspended and he was placed on probation for three years, the first six months to be served in a federal community treatment center.

On January 19, 1973, the government moved to revoke petitioner's probation because petitioner had concededly violated certain state narcotic laws. The court thereupon revoked probation and resentenced petitioner, then age twenty-one, to a term of five years' imprisonment. In its sentencing order the court noted that it was exercising the sentencing provisions of the Federal Youth Corrections Act, 18 U.S.C. 5010. However, the formal order failed to indicate which of the five subparagraphs of Section 5010 were being employed.[1] Thereafter, petitioner pointed to this omission in a motion to vacate his sentence. In denying the motion on May 30, 1973, the trial judge stated that he had intended subsection (b) of the Federal Youth Corrections Act[2] to govern, although the sentence remained

---

[1]The statute has been set forth in its entirety at Pet. 5.

[2]18 U.S.C. 5010(b) provides:

> If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter * * *.

fixed at five years' imprisonment. The court of appeals vacated the sentence and remanded the case to the district court with instructions that petitioner be sentenced in accordance with 18 U.S.C. 5010(d)[3] (Pet. App. A), since subsection (b) might result in six years' confinement.

1. Petitioner's contention that the court violated Rule 11, Fed. R. Crim. P., by failing to advise him of his eligibility to be sentenced pursuant to the Federal Youth Corrections Act, is unsound, since Rule 11 only requires that the court inform a defendant of the maximum penalty that can be given for his offense. Here, petitioner was warned that he could receive up to five years' imprisonment. That, in fact, is what he received. See *Robinson* v. *United States*, 474 F. 2d 1085, 1088 (C.A. 5), petition for a writ of certiorari pending, No. 73-7043.

There is no conflict among the circuits on this issue. In *Freeman* v. *United States*, 350 F. 2d 940 (C.A. 9), and *Pilkington* v. *United States*, 315 F. 2d 204 (C.A. 4), both relied upon by petitioner, the defendants were told prior to pleading guilty that they could receive maximum five-year sentences, but were subsequently resentenced under Section 5010(b) with the possibility of a six-year term. Here, however, the court of appeals vacated the sentence and remanded the case to the district court with instructions that petitioner be sentenced pursuant to Section 5010(d), rather than subsection (b), so that the possibility of a six-year sentence could be avoided. Petitioner's fear that he may be subject to a term in excess of five years is therefore purely speculative and unfounded.

[3] 18 U.S.C. 5010 (d) provides:

> If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.

2. Petitioner's contention that he was entitled to be present when the district court first issued its order specifying that the term of imprisonment was pursuant to Section 5010(b) of the Youth Corrections Act, ignores the fact that this action was not taken at a "[critical] stage of the proceedings" requiring the attendence of the defendant. Rule 43, Fed. R. Crim. R. In any case, the order of the court below, vacating and remanding petitioner's sentence, vitiates any prejudice which might have occurred due to petitioner's absence. See *United States* v. *Birnbaum*, 421 F. 2d 993, 998 (C.A. 2), certiorari denied, 397 U.S. 1044; *United States* v. *McCray*, 468 F. 2d 446 (C.A. 10).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

OCTOBER 1974.

DOJ-1974-10